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December 18, 2016

Federal Election Commission
Office of Complaints Examination
and Legal Administration
Attn: Donna Rawls, Paralegal
999 E Street, N.W.
Washington, DC 20346

RE: MUR 7151

Dear Ms. Rawls:

Please accept this response to your letter dated October 21, 2016, on behalf of Great America PAC ("GAP") and myself, in my official capacity as GAP's treasurer. Neither GAP nor I violated the Federal Election Campaign Act ("FECA"), as amended, and the FEC should not take any further action in the above-captioned matter.

GAP is a non-connected hybrid multicandidate political committee. The Complaint alleges President-Elect Donald J. Trump, while a candidate for President of the United States, accepted illegal in-kind contributions from GAP. Specifically, the Complaint claims political communications GAP made and reported as independent expenditures were actually coordinated with then-candidate Trump's campaign. As a result of this purported coordination, the Complaint contends, the expenditures made to pay for the communications constituted in-kind contributions from GAP to Trump that exceeded the contribution limit. Because there is no basis for concluding GAP coordinated its independent expenditures with Trump, his campaign, or his agents, the FEC should decline to take further action.

FACTUAL BACKGROUND

In or around July 2016, GAP decided to make certain independent expenditures in support of Donald J. Trump's candidacy for President of the United States. GAP was exclusively responsible, through its third-party vendor, for preparing a draft e-mail as well as a script for an audio recording. See Letter from Dan Backer, Counsel for Great America PAC, to Larry Levy, Counsel for Rudy Giuliani (July 25, 2016) (attached as Exhibit 1) (hereafter, "Backer Letter"). Because of Giuliani's success as Mayor of New York City, GAP requested his permission to have the e-mail distributed over his "signature," and sought to record him reading the script so audio and video excerpts could be incorporated into GAP's publicly distributed political advertisements. The advertisements identified Giuliani solely as a "former Mayor of New York City" and neither stated nor implied he had any relationship with Trump or the Trump campaign. The advertisements focused on the need to combat domestic terrorism, a topic with which Giuliani became closely identified due to his successful efforts to secure New York City in the aftermath of the 9/11 attacks.

Giuliani played no role whatsoever in determining the audience for GAP's intended communications, or the timing, method, means, mode, outlets, duration, frequency, or any other aspect of their distribution. *Id.* Giuliani reviewed a copy of the draft e-mail GAP had prepared,



making only a few “minor, incidental, non-substantive changes in wording, as well as correcting two typographical errors.” *Id.*; see Draft E-mail (attached as Exhibit 2).¹ These “de minimis changes” resulted in “no meaningful change to the content of the communications” GAP had prepared. Backer Letter 1, Exh. 1. Giuliani permitted GAP to distribute the e-mail, over his signature, to whatever recipients it wished, and did not participate in any discussions concerning its distribution strategy. He likewise agreed to make the requested recordings and did not participate in any discussions concerning GAP’s strategy for their use. GAP subsequently disseminated the e-mail over Giuliani’s signature, as well as advertisements including the audio and video clips Giuliani recorded.

Giuliani assisted with GAP’s communications solely in his personal capacity. He never stated, implied, or led anyone involved in these communications to believe “he had any authority—actual or implied—to act on behalf of or as an agent of any campaign.” *Id.* And no one who participated in developing the communications believed Giuliani was, or was acting as, an agent for Trump or the Trump campaign. Giuliani is a prominent figure in the Republican party, and both candidates and the public value his endorsement. He routinely appears in political communications in his personal capacity to advocate the election of House and Senate candidates precisely because he is such a trusted, respected figure, particularly concerning national security. Moreover, Giuliani did not convey any non-public information from Trump or the Trump campaign to GAP. *Id.*

LEGAL BACKGROUND

Hybrid committees such as GAP have a fundamental First Amendment right to make unlimited independent expenditures. *See Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011); *see also SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). An expenditure is “coordinated” with a candidate or a candidate’s campaign or agents does not qualify as “independent,” however, but rather is treated as an in-kind contribution to that candidate. 52 U.S.C. § 30116(a)(7)(B)-(C). An expenditure is deemed to be “coordinated” if it is made “in cooperation, consultation, or concert[] with, or at the request or suggestion of, a candidate” or the candidate’s authorized committee or agents. *Id.* § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20(a) (specifying references to candidates or authorized committees include their agents, as well).

FEC regulations implement this definition by establishing a three-prong test for determining whether an expenditure made to fund a communication must be deemed coordinated. *First*, the communication must be paid for by someone other than the candidate, his or her campaign committee, or a political party committee. 11 C.F.R. § 109.21(a)(1). This requirement

¹ In particular, Giuliani:

- corrected the spelling of “Fort Hood”;
- changed the phrase “our enemy” to “Radical Islamic terrorists/terrorism”;
- changed the phrase “on behalf of” to “in support of”;
- changed the word “supplement” to “support”; and
- corrected “25 years” to “29 years.”



is satisfied here because GAP paid for the communications at issue. *Second*, the communication must satisfy a “content” standard, *id.* § 109.21(a)(2), which is likewise satisfied here because the communications at issue “expressly advocate[d] . . . the election . . . of a clearly defined candidate,” Donald J. Trump. *Id.* § 109.21(c)(3).

Third, the expenditure must satisfy a “conduct” standard. *Id.* § 109.21(a)(3). A communication is deemed coordinated if, among other things, either the candidate or his authorized committee or agents are “materially involved” in decisions concerning the communication, including its content, intended audience, means or mode, timing or frequency, size or prominence, duration, or the specific media outlet to be used for it. *Id.* § 109.21(d)(2); *see also id.* 109.20(a) (including candidates’ agents within scope of regulations). Because GAP’s advertisement did not satisfy this “conduct” standard, it was not coordinated, was properly reported as an independent expenditure, and cannot be deemed an in-kind contribution. The FEC should therefore dismiss the Complaint.

ANALYSIS

THERE IS NO REASON TO BELIEVE THAT GAP’S ADVERTISEMENT WAS COORDINATED

The Complaint offers no reason to believe GAP’s political communications satisfy the “conduct” standard for being deemed “coordinated.” *See* 11 C.F.R. § 109.21(d)(2). The Complaint does not (and could not truthfully) allege any internal, confidential, or material non-public information from the Trump campaign was used in crafting GAP’s communications. Its only basis for suggesting the advertisement was coordinated is the fact it featured Mayor Giuliani making statements concerning Trump, President Barack Obama, and Senator Hillary Clinton. Compl. 3. The Complaint rests entirely on the incorrect premise that Giuliani was, and was acting as, an “agent” of Mr. Trump and his campaign.” *Id.* at 4.

Part I demonstrates the Complaint provides no reason to believe Giuliani was an agent of Trump. Part II elaborates that, even if Giuliani was an agent of the campaign for some purposes, nothing in the Complaint suggests he had actual authority to act on the campaign’s behalf with regard to communications by third parties. Part III shows, regardless of whether Giuliani was an agent of Trump, he did not act in that capacity when assisting with GAP’s advertisement, but rather solely in his personal capacity. For these independently sufficient reasons, GAP’s expenditure was not coordinated. The FEC therefore should dismiss the Complaint.

I. THE COMPLAINT PROVIDES NO REASON TO BELIEVE GIULIANI WAS AN AGENT OF THE TRUMP CAMPAIGN

Giuliani’s involvement in GAP’s communications did not cause GAP’s expenditures for those communications to be coordinated with the Trump campaign, because Giuliani was not an agent of the Trump campaign. FEC regulations define “agent” as “any person who has actual authority, either express or implied,” to engage in one or more specified activities concerning



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regarding Trump communications such as content or intended audience, and to provide material or information in creating Trump communications." *Id.* at 4-5.

The FEC should reject the Complaint's baseless declaration that Giuliani was an agent for the Trump campaign. As an initial matter, the Complaint is based on a fundamental misunderstanding of the regulatory definition of "agent." FEC regulations provide a person may qualify as an agent if they have "actual authority" to "[r]equest or suggest," "on behalf of" the candidate "a communication be created, produced, or distributed." 11 C.F.R. § 109.3(b)(1). The requirement that the potential agent must act on behalf of the candidate strongly suggests the requests or suggestions must be made to third parties, not to the candidate himself or the candidate's campaign. Thus, the Complaint's allegation that Giuliani "has authority to suggest *to the Trump campaign* that a communication be created" is not only false, but completely irrelevant. Compl. at 4-5 (emphasis added). The issue is whether Giuliani had authority to act on Trump's behalf with regard to third parties, which he did not. Indeed, literally anyone may suggest to a candidate a particular communication be created; such suggestions, of course, do not give rise to an agency relationship.

In any event, as the Complaint itself expressly acknowledges, Giuliani is "a close personal friend" of Trump. Compl. at 2 (quotation marks omitted). The fact Giuliani may have spoken with Trump, offered him policy advice, and assisted in helping him prepare for the presidential debates does not mean either Trump or the Trump campaign conferred "actual authority" on him to take actions on Trump's behalf. 11 C.F.R. § 109.3. The Complaint is completely devoid of any factual support or citation to evidence for its formulaic, conclusory assertion that Giuliani had authority to suggest communications, be involved in decisions regarding such communications, or provide information material to creating them.

This case is similar to *Iverson*, A.O. 2007-05 (May 4, 2007). Erik Iverson was Chief of Staff to Congressman Dennis Rehberg, a federal candidate. His responsibilities included managing "the Congressman's schedule, personnel matters, and the [congressional] offices' budgets." *Id.* at 1. He "received no express instruction from Congressman Rehberg," however, "that he is the Congressman's agent for fundraising purposes, nor has the Congressman's conduct caused Mr. Iverson to believe that he is the Congressman's agent for such purposes." *Id.* at 2. Consequently, the FEC properly concluded Iverson was not Rehberg's agent, and BCRA provisions governing agents of federal candidates therefore did not apply to him. *Id.*

Likewise, here, there is no actual evidence supporting the Democratic National Committee's baldfaced, self-serving assertions Giuliani either received express instructions from Trump that he was Trump's agent concerning third-party political communications, or that Trump engaged in any conduct that caused Giuliani to believe he was Trump's agent for such purposes. And Giuliani never claimed "he had any authority—actual or implied—to act on behalf of or as an agent of any campaign." Backer Letter 1, Exh. 1.

GAP did not invite Giuliani to read the scripts for its political communications—which focused on the need to combat domestic terrorism—due to any baseless misconception that Giuliani was an agent of the Trump campaign. Rather, GAP sought to enhance the credibility of its communications by drawing upon Giuliani's stature as former Mayor of New York City, who



helped shepherd the city through the aftermath of the 9/11 attacks and bore ultimate responsibility for its counterterrorism strategy. Thus, because the Complaint provides no reason to believe Giuliani was an agent of the Trump campaign, the FEC should dismiss it.

II. EVEN IF GIULIANI WERE AN AGENT OF THE TRUMP CAMPAIGN FOR SOME LIMITED PURPOSES, THE COMPLAINT PROVIDES NO REASON TO BELIEVE HE HAD ACTUAL AUTHORITY TO ACT ON THE CAMPAIGN'S BEHALF REGARDING COMMUNICATIONS BY THIRD PARTIES

In the alternative, even if the FEC finds reason to believe Giuliani may have been an agent of the Trump campaign for some purposes, the Complaint offers absolutely no such reason to believe Trump or the campaign had granted him "actual authority" to take actions or make decisions concerning political communications by third parties such as GAP. 11 C.F.R. § 109.3. A person is deemed an agent only when acting within "the scope of their actual authority" conferred by the principal. FEC, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 424 (Jan. 3, 2003); *see also id.* ("[A] principal would not assume 'liability' for agents who act outside the scope of their actual authority . . ."); *Rory Reid*, A.O. 2003-10, at 4 (June 16, 2003) (reiterating a person is an "agent" only when he "is acting pursuant to 'actual authority' from the Federal candidate"). A person cannot be an agent of a candidate with regard to actions of a type he has not been given actual authority to perform on the candidate's behalf.

As discussed above, the Complaint contends only that Giuliani spoke with Trump, offered advice, helped him prepare for debates, and sometimes spoke publicly in support of Trump. Nothing in the Complaint identifies any actions the Trump campaign took to confer actual authority on Giuliani to request, suggest, make, authorize, or be "materially involved" in decisions concerning political communications by third parties. 11 C.F.R. § 109.3(b). Even if Giuliani arguably possessed some limited degree of implied authority to act for the campaign in certain matters, there is no reason to believe it extended to creating or assisting with communications by outside entities. Because such communications are beyond the scope of any actual authority the Complaint's allegations could be read as supporting, he could not have been acting as an agent when he participated in GAP's communications.

III. GIULIANI DID NOT PARTICIPATE IN GAP'S ADVERTISEMENT AS AN AGENT OF THE TRUMP CAMPAIGN

Even if the FEC finds reason to believe Giuliani had the power to act as an agent of the Trump campaign, he participated in GAP's advertisement solely in his personal capacity, rather than as an agent of the campaign. The FEC has recognized that, when a person qualifies as an agent of a principal such as a candidate or political party, that person still retains the capacity to act outside the scope of that agency relationship. Under FEC regulations, a person is treated as an agent, and his conduct will be attributed to the principal, only when he "act[s] on behalf of the principal," 67 Fed. Reg. at 49,083, rather than on his own behalf or "on behalf of a different organization or person," 68 Fed. Reg. at 424; *Sen. Jon Corzine*, AO 2005-02, at 10 (Apr. 22, 2005) ("[A] principal may only be held liable under BCRA for the actions of an agent when the agent is acting on behalf of the principal."). A person may act at certain times as an agent for a candidate, and at other in a personal capacity or as agent for some other principal. A.O. 2003-10, at 5 (June



16, 2003); accord A.O. 2007-05, at 4; see also *Senate Majority PAC*, A.O. 2015-09, at 7 (Nov. 13, 2015) (concluding an individual is deemed an “agent” subject to BCRA’s soft-money restrictions “only when acting on behalf of a candidate, officeholder, or party committee,” not when “act[ing] in their own capacities” or “on behalf of other organizations”).

“[I]t is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal.” 68 Fed. Reg. at 424. This limitation “ensures that liability will not attach due solely to the agency relationship, but only to the agent’s performance of prohibited acts for the principal.” *Id.* In short, a person can “wear multiple hats,” and he is not deemed an agent when acting in an individual capacity or on behalf of another principal. *Id.*

Here, Giuliani appeared in GAP’s advertisements solely in his personal capacity. As former Mayor of New York City, Giuliani is a world-renowned authority on counter-terrorism. GAP’s advertisements concerned counter-terrorism, and Giuliani was an extremely credible and persuasive authority on the topic, regardless of any purported links with the Trump campaign. Like numerous House and Senate candidates, GAP sought to draw upon Giuliani’s personal reputation and expertise, rather than seeking to exploit any purported relationship with the Trump campaign, to enhance the efficacy of its communications. Because Giuliani was acting solely in his personal capacity, GAP’s communications cannot be deemed coordinated.

Again, *Iverson*, A.O. 2007-05, is directly on point. The FEC recognized that, if Congressman Rehberg “provide[d] Mr. Iverson with actual authority to solicit and receive contributions, then Mr. Iverson would be an agent of a Federal candidate.” *Id.* at 4. BCRA prohibits agents of federal candidates from soliciting any money, including non-federal funds, in excess of the statute’s contribution limits. See 52 U.S.C. § 30125. The FEC nevertheless concluded Iverson could simultaneously serve as chair of the state party and solicit unlimited contributions for the party’s non-federal account, so long as he did not do so in his capacity as Rehberg’s agent. A.O. 2007-05, at 4. Likewise, in this case, Giuliani was abundantly clear he was not purporting “to act on behalf of[,] or as an agent of[,] any campaign” when he participated in GAP’s political communications. Backer Letter 1, Exh. 1. He therefore was acting solely on his own personal behalf, engaging in his “core” constitutional right to quite literally engage in political speech. *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam). Because he did not assist with GAP’s political communications as an agent of the Trump campaign, those communications cannot be deemed coordinated.

CONCLUSION

For these reasons, the FEC should not find reason to believe GAP or Backer violated any federal campaign finance restrictions, and the Complaint should be dismissed.

Respectfully submitted,

/s/ Dan Backer

Dan Backer

Counsel for Great America PAC